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Issue Date: 25 January 2006

Case No. 2005 LHC 01246

OWCP No. 5-41534

In the Matter of

JAY BARTH,
Claimant
v.

NEWPORT NEWS SHIPBUILDING
AND DRY DOCK COMPANY,
Employer

Appearances:
Matthew H. Kraft, Esq., for Claimant
Benjamin M. Mason, Esq., for Employer

Before:
RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for temporary total disability and an ongoing *de minimis* award stemming from an injury suffered by Claimant, Jay Barth, covered by the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq*. (Hereinafter referred to as the "Act"). Claimant suffered an injury to his back on February 1, 1982 and had been paid compensation on the injury until January 23, 2004. Claimant now seeks an award of temporary total disability for the dates of October 1, 2004 and October 28, 2004 as well as a *de minimis* award beginning January 24, 2004 as a result of the injury.

The claim was referred by the Director, Office of Workers' Compensation Programs to the Office of Administrative Law Judges for a formal hearing in accordance with the Act and the regulations issued thereunder. A formal hearing was held on September 8, 2005. (TR).[1] At the hearing, Claimant sought modification, under § 22 of the Act, of the January 23, 2004 *Decision and Order* of Judge Fletcher E. Campbell, Jr., which in turn had modified the March 14, 1986 *Decision and Order* of Judge Robert J. Brissenden. Judge Brissenden's Order awarded Claimant

[1] EX - Employer's exhibit; CX- Claimant's exhibit; and TR - Transcript.

permanent partial disability benefits based on a loss of wage earning capacity from February 14, 1983 and continuing. Judge Campbell's Order dated January 23, 2004, modified Judge Brissenden's 1983 Order, and terminated Claimant's benefits based on a change in Claimant's position and earnings. Subsequently, the Claimant missed two days of work, for which he was paid sick leave, which he asserts are days he should be paid temporary total disability compensation. This request for modification of Judge Campbell's decision was filed by the Claimant, who bears the burden of proof.

During the September 8, 2004 hearing, Claimant submitted twelve exhibits, identified as CX 1- CX 12, which were admitted without objection (TR. at 12). Employer submitted two exhibits, EX 1 through EX 2, which were admitted without objection (TR. at 13). The record was held open until November 14, 2004 for the submission of briefs. Employer submitted its brief on November 14, 2005. Claimant submitted his brief on November 15, 2005.

The findings and conclusions which follow are based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES

The following issues are disputed by the parties:

1. Whether Claimant is entitled to modification of Judge Campbell's January 23, 2004 Order;

2. Whether Claimant is entitled to a *de minimis* award beginning January 24, 2004.

STIPULATIONS

At the hearing, Claimant and Employer stipulated that:

1. An employer-employee relationship existed at all relevant times;

2. The parties are subject to the jurisdiction of the LHWCA;

3. Claimant sustained an injury to his back arising out of and in the course of his employment on February 1, 1982;

4. Claimant gave Employer timely notice of the injury and filed a timely claim for compensation;

5. Employer filed a timely First Report of Injury with the Department of Labor and a timely Notice of Controversion;

6. Claimant's average weekly wage at the time of the injury was $326.32, which results in a compensation rate of $217.54;

7. Claimant reached maximum medical improvement for his back injury on February 14, 1983;

8. Claimant began the job of a Production Planner at NNS on April 1, 1999, at a salary of $2,700 per month and has performed the job of a Production Planner at NNS since that time;

9. The minimum wage in effect at the time Claimant began performing the job of a Production Planner at NNS on February 1, 1982 was $3.35 per hour;

10. The minimum wage in effect at the time Claimant began performing the job of a Production Planner at NNS on April 1, 1999 was $5.15 per hour;

11. The National Average Weekly Wage in effect at the time of Claimant's injury o f February 1, 1982, was $248.35;

12. The National Average Weekly Wage in effect at the time that Claimant began performing the job of a Production Planner at NNS on April 1, 1999 was $391.22;

13. Claimant has been paid in accordance with the *Decision and Order* of Judge Robert J. Brissenden dated March 14, 1986 and filed in the Office of the District Director on March 17, 1986;

14. Claimant is unable to return to his pre-injury work at the shipyard;

15. The Special Fund paid permanent partial disability compensation benefits to Claimant pursuant to Judge Brissenden's March 17, 1986 Order through January 23, 2004.[2]

16. Claimant was out of work on both October 1, 2004, and October 28, 2004, and received sick pay for these said dates.[3]

[2] JX 1.

[3] TR. at 9.

DISCUSSION OF LAW AND FACTS

Testimony of Claimant

Claimant testified that he is currently employed by Employer as a Product Planner. (TR. at 16). Claimant detailed his employment duties:

> I plan jobs. I review drawing, billing materials, make corrections or submit corrections to the billing materials. Also, develop target hours for the jobs in the shop to work.

(TR. at 16). Claimant further explained:

> [I]f I find a bad bill of materials, then I submit it to the department who's responsible for that billing material.
>
> If I do not find a bad bill of materials or when it's corrected, then I develop a work package through the system we use at the Shipyard which is SAP.

(TR. at 16). Claimant described target hours as "the hours that the ship has to work that job." (TR. at 16). Claimant noted that he has held his current position since April 1, 1999. (TR. at 17).

Claimant testified that he has permanent restrictions as a result of his back injury. Claimant related his understanding of the restrictions:

> My understanding no repetitive forward bending, sliding, stooping, no vertical ladders and no lifting in excess of 30 pounds.

(TR at 17). Claimant noted that he has had four back surgeries since 1982. (TR. at 17). Claimant recalled that his two most recent surgeries were performed on March 21, 2003, and January 24, 2001. Claimant missed approximately twelve weeks of work for each surgery. (TR. at 17). Claimant testified that he noticed some improvement following his 2001 surgery. (TR. at 18). However, "[a]fter about six months, [Claimant] began noticing a little bit more pain radiating down [his] legs." (TR. at 18). Claimant testified:

> [A]t the time I was still going to Dr. Young and he was still treating me for that from post surgery, and so he was aware at that time that there was some recurrence of pain in my low back and legs.

(TR. at 19).

Claimant consulted Dr. Young again on August 25, 2004, "because I started having a lot of problems, more and more severe, lot more leg pain, low back pain." (TR at 20). Dr. Young noted that Claimant "has been having continued lower back pain which has progressively gotten worse in the past several months." (TR. at 19). Claimant testified that since this August 25, 2004 consultation:

> The back pain is still the same. The leg pain is still the same. However, since that time I've started to notice on occasion numbness on the bottom right foot and some pain in the top of my left foot, which is actually through the ankle area.

(TR. at 19). Claimant explained that "the numbness has been over about the last six or so months and it's very infrequent." (TR. at 20).

Claimant detailed the times he has missed work because of his back problems since August 25, 2004:

> I missed two days in October, I missed two days in January, and I missed two-and-a-half days, I don't remember the month, it was March, April time frame.
>
> [. . .]
>
> It was one day early October, I believe it might have been the 8th, I'm not sure of the exact date. Then later in the month I missed a day. And then, if I remember correctly, the 10th and 11th of January. Like I say the days that I missed, the two and a half days, I don't remember that exact days, I just remember March, April time frame.

(TR. at 20). Claimant's attendance card recorded that he was out "sick" on October 1, 2004. However, Claimant testified that he was actually out because of his back pain. (TR. at 21). Likewise, Claimant was marked out as "sick" on October 28, 2004, which he again recalled missing work because of back pain. (TR. at 21). Claimant testified that his supervisor, Bruce Cashwell, marked that he was out "sick" on those particular days. (TR. at 22, 25). Claimant explained:

> I called into my supervisor's phone, and if he's not in his office it goes to his office clerk's phone and as always the case, I call in and tell them I am out for whatever the reason is.
>
> On those particular days, I called in and told them I was out because of my back and my supervisor put in me for 'sick' rather than 'industrial.'

(TR. at 22). Claimant noted that he received sick pay on these days. (TR. at 26). Claimant also noted on these days that he "called Dr. Young's office and reported to them I was out because of my back [. . .] on those days." (TR. at 27). Claimant explained that he did not see Dr. Young on these days because:

> It takes about three months to get an appointment with Dr. Young. I would call and get an appointment, it would be about three months. So I called him and reported to them I was out those days and any questions, it's supposed to be in my permanent records with Dr. Young.

(TR. at 29).

Claimant testified that he once again consulted Dr. Young on March 2, 2005 and on March 4, 2005. (TR. at 23). Claimant testified to his understanding regarding further treatment following these visits:

> Dr. Young told me at that time that there was – because of the pain that I was having and if it progressively got worse or it got to the point where I could not deal with it, there was a possibility he could put me on a morphine pump or surgery at some other date when it was absolutely determined as necessary.

(TR. at 23). Claimant also noted that his last surgery was a spinal fusion, the L-3 through S-1 vertebrae, and that his now has metal rods and screws in his back. (TR. at 23).

Claimant described his ongoing pain and problems:

> I have pain in my low back quite frequently and pain radiating down both legs. It could be both legs at the same time, sometimes its one leg, sometimes it's the other leg, burning pain in my right hip quite frequently, and that's the basis of the pain I have.
>
> If I sit for long periods of time, and not able to change positions, I have difficulty getting up. I have severe pain in my tail bone and it makes it difficult to get up to a standing position.

(TR. at 24). Claimant noted that he suffers from these problems while working, but has nevertheless continued in his employment. (TR. at 24).

Claimant was asked whether, in his opinion, he feels that he will continue to miss work in the future:

> I've had severe pain in the past, usually during the wintertime, last years have been the worse and it's the period of time when the either is changing to colder weather, periods where it warms up and gets cold again.
>
> I have frequent pain. I work most days with pain to some degree or another. I only go home or stay home when I cannot function. And based on what I've experienced over the last two years, since I've had that last surgery over two and a half years now, I expect that I probably will.

(TR. at 31).

Medical Records of Dr. Young

Dr. Young saw Claimant for a follow-up evaluation on March 2, 2005. Dr. Young's notes of this visit record:

> [Claimant] relates to me that since he was last here on August 25, 2004, he has missed at least two days of work because of severe back pain. Certainly, this is probably reasonable. He also states that he has more difficulty arising from the sitting to the standing position, especially if he is in a chair trying to stand up or sitting in church. He knows that he must lean forward to arise from the sitting position. [Claimant] has some mild weakness in his legs which causes difficulty going up and own the stairs, and his Neurontin medication is not as effective as it once was. Yet, he continues to work five days a week at his desk job. This is not easy for him to do, but being well motivated, he has tried to do so.
>
> [. . .]
>
> I suspect that this man will probably have more surgery in the future, although the future is hard to predict considering has had already had five lumbar spine operations. Most likely, [Claimant] will continue to have chronic pain in his back and legs. It is of note today that he has an absent left ankle reflex and neurological deficit in his legs, which is to be expected considering the amount of spine difficulties he has had in the past.

(CX 4).

On March 4, 2005, Dr. Young drafted the following letter addressed "To whom it may concern":

> It is my medical opinion that [Claimant] was out of work and unable to do his normal duties on October 1, 2004 and October 28, 2004 because of severe back and leg pains. This gentleman has had five lumbar spine operations and, being extremely motivated, works whenever his spine permits. It is my medical opinion that his spine pain did not allow him to work on October 1, 2004 and October 28, 2004. I hope this will serve as a medical reason as to the fact that he was unable to work on those specific days.

(CX 4).

Analysis

Claim of Temporary Total Disability for October 1, 2004, and October 28, 2004

At the hearing, Claimant sought modification under Section 22 of the Act of the June 23, 2004, *Decision and Order* of Judge Campbell which in turn modified the March 14, 1986

Decision and Order of Judge Brissenden. Judge Brissenden had awarded Claimant permanent partial disability benefits based on a loss of wage earning capacity from February 14, 1983. Judge Campbell's *Decision and Order* terminated those benefits based on a change in Claimant's position and earnings. Claimant now seeks modification based on a change in conditions and requests a *de minimis* award. Claimant asserts that he is entitled to temporary total disability benefits for October 1, 2004 and October 28, 2004, arguing that the uncontradicted medical evidence and testimony establishes that he was unable to work on those days due to his injury related back condition.

Section 22 of the Act, 33 U.S.C. § 922, provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based on a mistake of fact in the initial decision or on a change in claimant's physical or economic condition. *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291 [115 S. Ct. 2144, 132 L. Ed. 2d 226], 30 BRBS 1(CRT) (1995). The party requesting modification has the burden of proof to show a mistake of fact or change in condition. *See Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990); *Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168 (1984).

In the present case, Claimant is seeking modification based on a change in conditions. Generally, modification based on a change in condition is granted where the claimant's physical or economic condition has improved or deteriorated following entry of the award. *Fleetwood v. Newport News Shipbuilding and Dry Dock Co*., 16 BRBS 282 (BRB 1984). The Board has stated that the physical change must have occurred between the time of the award and the time of the request for modification. *Rizzi v. The Four Boro Contracting Corp.*, 1 BRBS 130 (1974). The party requesting modification due to a change in condition has the burden of showing the change in condition. *See Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168 (1984) (since Claimant's inability to perform his secondary occupation of farming existed at the time of the initial proceeding and the evidence could support the Administrative Law Judge's finding of no increased loss to Claimant's injured hands, Claimant failed to demonstrate a change in condition); *Kendall v. Bethlehem Steel Corp.*, 16 BRBS 3 (1983) (Claimant did not establish that his back condition had worsened since the prior decision denying benefits and thus had no compensation disability as a result of his back injury). Since the party requesting modification has the burden of proving a change in condition, the Section 20(a) presumption is inapplicable to the issue of whether Claimant's condition has changed since the prior award. *Leach v. Thompson's Dairy, Inc.*, 6 BRBS 184 (1977).

An initial determination must be made as to whether the petitioning party has met the threshold requirement by offering evidence demonstrating a mistake of fact or that there has been a change in circumstances and/or conditions. *Duran v. Interport Maintenance Corp.*, 27 BRBS 8 (1993); *Jensen v. Weeks Marine, Incorporated*, 34 BRBS 147 (2000). This inquiry does not involve a weighing of the relevant evidence of record, but rather is limited to a consideration of whether the newly submitted evidence is sufficient to bring the contention within the scope of Section 22. If so, the administrative law judge must determine whether modification is warranted by considering all of the relevant evidence of record to discern whether there was, in fact, a mistake of fact or a change in physical or economic condition. *Id.* at 149.

Claimant argues that he has undergone a change in condition evidenced by the two days of work he missed, October 1, 2004 and October 28, 2004, which he asserts relates to his back

injury. In support, Claimant offers Dr. Young's medical records, which opined that these two missed days were medically reasonable and appropriate in light of Claimant's ongoing back condition. Dr. Young further opined that Claimant appears well motivated and that he does not miss work unless absolutely necessary by virtue of his back pain. (CX 3-O).

Additionally, while Claimant did not actually see Dr. Young on the days he alleges extreme back pain, he testified that he contacted Dr. Young's office on each of the respective dates. Claimant explained that he did not see Dr. Young on these days because:

> It takes about three months to get an appointment with Dr. Young. I would call and get an appointment, it would be about three months. So I called him and reported to them I was out those days and any questions, it's supposed to be in my permanent records with Dr. Young.

(TR. at 29). Notably, there is no recordation of these calls in Claimant's medical records on the date that they were allegedly made. The evidence in the record further indicates that Claimant did not see Dr. Young again until March 2, 2005 and on March 4, 2005; approximately five months after Claimant missed the two days of work in question (TR. at 23) Dr. Young's notes dated March 2, 2005, are the only written evidence that Claimant informed Dr. Young that he had missed two days of work because of back pain. Specifically, Dr. Young's notes read, "Claimant relates to me that since he was last here on August 25, 2004, he has missed at least two days of work because of severe back pain." (CX 4).

Nevertheless, Claimant asserts that he is entitled to modification because by "applying the traditional model for disability analysis under the Act, it is clear that [Claimant] is unable to return to his full-duty, pre-injury work at all relevant times, and that, but virtue of his incapacity from work on the two days at issue, Employer is unable to establish the existence of suitable alternate employment on those dates." (Claimant's brief at 11). Accordingly, Claimant purports that he is entitled to temporary total disability benefits for October 1, 2004 and October 28, 2004.

Employer argues that the request for modification should be denied, because Claimant has not presented evidence of a change in conditions. The decision of Judge Campbell established that the Claimant no longer had a loss of wage earning capacity as of June 23, 2004. Claimant asserts that because he was out of work on two dates because of his back injury, he has established a change of conditions, justifying a modification of the decision by Judge Campbell.

The only evidence offered by Claimant to support a change in conditions is his testimony that he was out of work on October 1, 2004 and October 28, 2004, due to his back pain, and a general letter drafted by Dr. Young addressed "to whom it may concern", dated March 4, 2005, that stated his opinion that it was reasonable for Claimant to miss two days of work due to his back pain.

Employer asserts that Dr. Young's letter provides no basis for his opinion, other than the fact that Claimant has undergone five operations in the past and works whenever his spine permits. Employer additionally notes that Claimant's testimony does not indicate that he suffered from severe back and leg pain on those days nor is there any evidence of any activity undertaken by the Claimant or any other factors that would have brought on any back or leg pain on those days. (CX 4). Employer concludes that without supporting evidence, the mere

assertion of Claimant's treating physican that his two days away from work in October 2004 are related to his back injury is insufficient to warrant temporary total disability on those days. *See Director, OWCP v. Newport News Shipbuilding and Dry Dock Co. (Carmines)*, 138 F.3d 134, 32 BRBS 48 (CRT)(1998).

As stated above, in a modification analysis, I must first determine whether Claimant has met the threshold requirement by offering evidence demonstrating a mistake of fact or that there has been a change in circumstances and/or conditions. *See Duran*, 27 BRBS 8; *Jensen,* 34 BRBS 147. Claimant does not appear to allege mistake in fact. Rather, he seems to allege change in circumstances warrants modification in the present case.

Claimant has failed to offer evidence that his condition has changed since Judge Campbell's D&O, as is the necessary threshold in a modification analysis. *Duran*, 27 BRBS at 8; *Jensen*, 34 BRBS at 147. While Claimant does testify that his pain has increased, he has offered no objective medical evidence supporting a finding of a change in condition. There is additionally no evidence of an incident or occurrence that could have aggravated or exacerbated Claimant's pain, and he does not appear to allege that he is suffering from a different pain than the chronic pain he has suffered since the date of his original injury. In fact, Dr. Young's notes of the March 4 visit allude to Claimant's past spine difficulties, and notes Claimant "will continue to have chronic pain in his back and legs." (CX 4).

Claimant's two missed days of work is insufficient to evidence a change in condition sufficient for modification under Section 22. Though Claimant alleges that he specifically had to miss two days of work because of increased back pain, the record simply does not support this proposition. Despite Claimant's assertion that he informed his supervisor that he was out due to work-related back pain, his employment record indicates that he called in as "sick" on both days in question. Additionally, Claimant alleged that he called Dr. Young's office on these two days to report the increased back pain. However, any notation of these calls is notably missing from the record. While it is understandable that it takes some time to get a doctor's appointment, Claimant did not actually consult Dr. Young until approximately five months after he missed work in October, allegedly due to his work related back pain. It seems unreasonable for Claimant to have waited five months to seek medical treatment if his condition had changed due to increasingly worse back pain. Thus, Claimant's missed work in October 2004, even if it was due to the back pain from his 1982 injury, fails to evidence a change in condition which could justify an otherwise final decision and order.

Claimant does not appear to have suffered a change in economic condition since Judge Campbell's order. In his January 23, 2004 order, Judge Campbell determined that Claimant's wages as a production planner accurately represent his actual wage earning capacity. As such, Judge Campbell determined that Claimant no longer suffered a loss of wage-earning capacity and is not longer entitled to permanent partial disability compensation. In the current motion for modification, the burden is now on Claimant to establish a change in economic conditions. Missing two days of work appears to have had no effect on Claimant's economic conditions. In fact, the parties stipulated that Claimant was paid full sick pay on these days. (TR. at 9). Claimant has not argued that his actual wages do not accurately reflect his current wage-earning capacity, and he has failed to meet his burden of establishing an alternative reasonable wage earning capacity. *See Grage v. J.M. Martinac Shipbuilding*, 21 BRBS 66, 69 (1989), *aff'd sub*

nom., J.M. Martinac Shipbuilding v. Director, OWCP, 900 F.2d 180 (9th Cir. 1990). As such, Claimant has failed to show that he has suffered a change in economic conditions since Judge Campbell's order.

Considering this evidence, and the notable lack of objective medical evidence detailing a change in Claimant's physical condition since Judge Campbell's order, I find that Claimant has failed to carry his burden to establish that a change indeed has occurred that justifies modification of a final decision and order. Upon consideration of the record, I find that the Claimant has failed to show a either mistake of fact or a change in condition since Judge Campbell's January 23, 2004 *Decision and Order*, and I therefore find that he is not entitled to modification under § 22 of the Act.

De Minimis Award

The Claimant also seeks a *de minimis* award due to the probability of a future loss of wage earning capacity due to his 1982 injury. At the outset, it is noted that there is no indication of why the Claimant did not seek a *de minimis* award when his claim was before Judge Brissenden or when the original award was modified by Judge Campbell in 2004. Because both of the earlier decisions are final, the Claimant's present request for a *de minimis* award is also a request for modification of Judge Campbell's final decision and order. Thus, the Claimant bears the burden of proof of a change in conditions or a mistake in a determination of fact, in order to modify the final decision of Judge Campbell. For the reasons set out above, I find that the Claimant has not established a change of conditions or a mistake in a determination of fact. Therefore, the order of Judge Campbell is not subject to modification to now provide a *de minimis* award. Nevertheless, for completeness, the analysis will be made as to whether the Claimant has established that a de minimis award should have been made.

A *de minimis* award is proper where an employee with a proven medical disability presently has no loss of wage-earning capacity, but reasonably expects to incur a loss in wage-earning capacity in the future. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54 (1997). The purpose of a *de minimis* award is to provide a continuing nominal award to perpetuate the ability of an injured claimant to seek a Section 22 modification of the current order if there is a future economic harm. *Id.* at 129, 135. In order to obtain a *de minimis* award, there must be a significant potential for a future reduction in the claimant's earning capacity stemming from the current injury. *Id.*, 521 U.S. at 137 (requiring a showing that there is a "significant possibility" that a worker's wage-earning capacity will at some future point fall below his pre-injury wages).

The burden of showing a future loss in wage earning capacity is on the proponent of the order; and when the evidence is evenly balanced, the proponent loses. *Rambo II*, 521 U.S. at 138-9, 31 BRBS at 61-62 (citing *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 270 (1994)). Therefore, in a claim seeking a *de minimis* award, the claimant has the burden of providing evidence establishing that "the odds are significant that his wage-earning capacity will fall below his pre-injury wages at some point in the future." *Id.*; *see, e.g., Gilliam v. Newport News Shipbuilding & Dry Dock Co.*, 35 BRBS 69 (2001) (upholding the ALJ's determination that the claimant did not meet his burden of proof, as he failed to provide any direct statement by claimant's doctor attesting to the significant possibility that he would need surgery and thus miss

work or suffer a diminished wage-earning capacity, i.e., suffer future economic harm as a result of his injury).

Claimant specifically argues in support of a *de minimis* award:

> Given [Claimant's] prior surgeries, the permanent restrictions, the prior lost time, the prior long term awarded loss of wage earning capacity, the ongoing pain and problems, the time missed more recently, and [the] medical opinions of Dr. Young, [Claimant] submits that the evidence of record fully supports a reasonable expectation a future loss of wage earning capacity such that a *de minimis* award should be entered in his favor in this case.

(Claimant's brief at 13-4). Employer responds that "there is no evidence, much less a significant possibility, that Claimant's wage earning capacity will fall below the level of his pre-injury wages some time in the future and therefore [. . .] Claimant has failed to carry his burden in seeking a *de minimis* award." (Employer's brief at 12).

In the instant case, Claimant has not presented any evidence that there is a significant potential that his work related back injury will one day result in a diminished earning capacity. Granted, Claimant has seemed to suffer continued pain as a result of his work injury. However, any loss of wages as a result of this injury is speculative at best. Notably missing from the record is any evidence or opinion of how much work Claimant potentially expects to miss in the future because of his injuries and there is no specific evidence in the record that Claimant's condition will deteriorate in the future. *See Palmer v. Washington Metropolitan Area Transit Authority*, 20 BRBS 39 (1987). Additionally, Dr. Young's records indicate that Claimant currently "works most days with some degree of pain." There is no indication offered in the record that this could change at some point in the future.

Claimant's argument that the two missed days of work, allegedly due to back pain, supports a reasonable expectation a future loss of wage earning capacity is to no avail. As discussed above, it has not been sufficiently established that the two missed days of work were due to the work related back pain. Claimant's employment records indicates that he was "sick" on these days, and despite Claimant's testimony to the contrary, there is no record evidencing that he called Dr. Young's office on these dates in question to complain of back pain or that he sought any other medical treatment.

Further, there is no evidence in the record of the likelihood that Claimant's back will further disable him. The medical records fail to support a finding that Claimant may suffer from a loss of wage earning capacity at some point in the future. Dr Young's medical opinion merely states:

> I suspect that this man will probably have more surgery in the future, although the future is hard to predict considering has had already had five lumbar spine operations. Most likely, [Claimant] will continue to have chronic pain in his back and legs. It is of note today that he has an absent left ankle reflex and neurological deficit in his legs, which is to be expected considering the amount of spine difficulties he has had in the past.

(CX 4). Dr. Young's wavering opinion as to whether Claimant will require future surgery is insufficient to establish that there is a significant possibility that Claimant will suffer future economic harm as a result of his injury. The Board has held that a *de minimis* award may not be based on mere speculation of future harm that is unsupported by any evidence in the record. *Smith*, 16 BRBS at 289; *Winston v. Ingalls Shipbuilding, Inc.*, 16 BRBS 168, 172-3 (1984). Although Dr. Young states that Claimant may require surgery in the future, there is no indication of how likely this surgery is, whether Claimant would incur a loss of compensation, or whether Employer would object to this medical treatment. Arguably, surgery could result in increased restrictions and fewer employment opportunities for Claimant, thereby potentially affecting Claimant's wage earning capacity. However, the likelihood that Claimant will even undergo an additional surgery is highly uncertain as it has merely been mentioned as a possibility. Significantly, Dr. Young's own office notes question the actual probability of Claimant's future surgeries by observing that "the future is hard to predict considering that [Claimant] has already had five lumbar spine operations." (CX 4). Thus, nothing in Dr. Young's notes, or any other medical evidence of record, permit the finding that there is a significant possibility that Claimant's wage earning capacity will fall below the level of his pre-injury wages at some time in the future. Therefore, I find that Claimant has failed to carry his burden in seeking a *de minimis* award.

ORDER

Accordingly, it is hereby ordered that Claimant's request to modify the January 23, 2004 *Decision and Order* of Judge Fletcher E. Campbell, Jr., under § 22 of the Act is denied.

A

RICHARD E. HUDDLESTON
Administrative Law Judge